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Kentucky Developments in 1954: Personal and Real Property, Future Interests and Trusts

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During 1954 the Kentucky Court of Appeals decided eleven cases in the property field and related areas which seem worthy of summary here. A few of these decisions are significant because they add something new to well-established legal principles, but most of them are interesting because they show how traditional legal principles are being applied by the court. Also, some valuable contributions treating property problems were published in the 1954 Volume of the Kentucky Law Journal, and an important water rights statute was enacted at the 1954 Session of the Kentucky General Assembly. This article discusses the significant cases under appropriate topical headings, summarizes the law review contributions briefly and treats the water rights statute at the end.

I. CASES

Personal Property

Gifts:

Delivery adequate to achieve a valid gift is a practical legal problem which seems to have endless factual manifestation. In *Hardy* v. *St. Matthews' Community Center*,[1] donor purchased a twenty-cent lottery ticket entitling the holder to a chance on a Buick automobile given away by the St. Matthews' Community Center at the St. Matthews Potato Festival. She wrote the name of her infant niece on the ticket, mailed the stub to the sponsoring organization and told the donee's mother: "I have given each one of your children a chance on some prizes at the Potato Festival." Possession of the ticket was not transferred to the donee or her mother, and when it proved to be the winning one, donor denied having made the gift. The gift was sustained on the theory that the act of writing donee's name on the ticket and

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[1] 267 S.W. 2d 725 (Ky., 1954).

returning the stub to the sponsor, coupled with donor's declaration of intent to donee's mother, constituted a delivery of the subject matter of the gift. The court said that delivery may be symbolic and cited the Kentucky pass-book cases holding that a deposit of money in the name of infant donees, coupled with subsequent declarations of intent, is sufficient to constitute a gift, despite the retention of the pass-book by the donor.[2] The court also said that acceptance is presumed in the case of an advantageous gift to an infant.[3]

Strict application of traditional principles governing symbolic delivery make it doubtful whether a gift is consumated unless possession of the symbol itself is transferred. Donee's right to control the subject matter of the gift is essential to his possession and this right results from transfer of the symbol. Most pass-book gifts are best explained not on the theory that a symbolic delivery can be made without transferring the symbol, but on the ground that the act of depositing money when accompanied by adequate manifestation of intention is itself a sufficient act of delivery.[4] So here donor's act of writing donee's name on the ticket and returning the stub to the sponsor was a sufficient actual delivery, even though the ticket was not handed to donee. This is the only sensible view of delivery requirements in the instant case if the subject matter of the gift was the ticket rather than the automobile. It could hardly have been the latter, since the drawing had not been held and neither the donor or the donee had title or claim to the prize until later.

However outmoded the traditional requirements for a legal delivery may be, the primary function of delivery is evidentiary in the sense that a definite physical act helps remove doubt as to donor's intention. Technical requirements as to the nature of the physical act should not be applied so strictly as to preclude the enforcement of the gift where donor's intention is clear, and the

[2] Collins v. Collins' Adm'r, 242 Ky. 5, 45 S.W. 2d 811 (1931).

[3] Citing Newlon v. Newlon, 310 Ky. 737, 220 S.W. 2d 96 (1949). This particular point is unnecessary to the decision reached in the principal case since it is generally conceded that any donee, infant or not, is presumed to accept any advantageous gift unless he rejects it.

[4] After considering the authorities at length, the court said in the Collins case: "If the *deposit* is accompanied by declarations or acts showing an intention of divesting the donor of all dominion and control over the fund and of vesting it in the donee, it will be given effect as a completed gift." (Emphasis added) 242 Ky. 5, at p. 13, 45 S.W. 2d 811, at p. 815 (1931).

decision in the *Hardy* case is sound on this basis. The opinion might have stated more directly that a clearly intended gift should not fail for want of a normal-type actual delivery.

Bailments:

The relation of bailor-bailee results primarily from transfer of possession, but the contractual nature of the bailment must not be forgotten in determining bailee's liability for breach of duty. The decision in *Williams* v. *Buckler*,[5] is significant because it confirms the rule that a bailee who deviates from the terms of the bailment is absolutely liable. It is also interesting because the bailee was a minor. Farm machinery was bailed to the minor for use on his farm with the understanding that it would be stored in a particular warehouse when not in use. The bailee stored the machinery in a different warehouse where it was destroyed by fire.

The court reasoned that a minor has no tort liability for breach of bailment terms unless a necessary is involved, since the tort is an incident of a contract; but it classified farm machinery as a necessary for a minor farmer supporting a wife and child. The court held that the bailment terminated at the moment the bailee deviated from the terms by storing the property in an unauthorized place. This was a conversion, and the bailee was absolutely liable for the value of the machinery when it was destroyed the same as if he had taken the property in the first place without permission.

In spite of the fictious conceptualism involved, this result seems reasonable enough so long as actual damage or loss occurs because of deviation from the terms. But does a conversion occur even though no loss or damage is suffered, and even though the deviation does not cause the loss. That is, should principles of absolute liability extend so far as to create liability from the deviation alone. If so, a rather harsh responsibility is placed on the bailee which might conceivably deter him from safeguarding the property in a better way than is provided in the bailment terms. If deviation without loss or without causing the loss is a conversion, the proper basis for recovery by the bailor would seem to be that conversion amounts to a forced sale, and the bailee must pay the value of the property at the time the bailment is

[5] 264 S.W. 2d 279 (Ky. 1954).

breached. Among other things, this rationalization over-emphasizes the contractual aspect of a bailment. Equally adequate protection for the bailor would result if bailee's liability is grounded primarily in tort and based only on negligence. Under this approach a deviating bailee would be required to exercise the reasonable care under the circumstances expected of any bailee. Failure to comply with the terms of the bailment would certainly be an important circumstance for the jury to consider. The decision in the *Williams* case was properly confined to liability where loss occurs and is not an invitation to take the problem of liability without loss resulting from deviation before the court. The principle of absolute liability for deviation alone should be examined carefully before it is used to protect the interest of the bailor.

Real Property

Adverse possession:

Title by adverse possession cannot be acquired if the possession is permissive, a point sometimes difficult to prove after long occupancy; and the difference between an adverse claim and permissive possession is not always clear, even when the former can be proved. This distinction was the crux of the controversy in *White* v. *Smith*.[6] A retired army man who returned to Knott County in 1932, discovered his two elderly cousins were nearly destitute. In order to help them, he purchased a four acre tract of land, repaired an old house on it and placed the cousins in possession. These elderly people lived on the property until 1950 and made improvements on it from time to time. In 1943, their benefactor died intestate, and during the next seven years, two of his heirs purchased the interest of all his remaining heirs. Then they attempted to negotiate a sale of the property. The possessors sued to quiet title, claiming ownership through parol gift in 1932. The heirs contended the claimants' possession was merely permissive, but the court quieted title in the elderly people on the theory that an unconditional parol gift accompanied by actual possession for more than fiftten years, with claim of ownership, gives title. The gift was evidenced by the testimony of one of the claimants as well as testimony by an attorney that the

[6] 265 S.W. 2d 937 (Ky. 1954).

donor had told him many times about giving the property to the cousins. This seems more than enough to rebut the assertion of permissive possession by the heirs. If so, claimants' acts of possession would seem to establish sufficient color or adverse claim of title without reliance on the parol gift.

Litigation arising out of boundary line disputes frequently presents a close question as to whether principles of adverse possession should govern or whether the parties have fixed the location of the disputed line by agreement. The adverse possession theory was used in *Ballard* v. *Moss*,[7] a case illustrating the strictness with which a court may view the acts necessary to constitute possession. Appellants acquired their lot in 1930, built a residence and garage on it, and shortly thereafter, planted a row of trees and shrubbery along what they then considered their east boundary line. They treated this tree and shrubbery line as their east boundary without interference or complaint until appellees acquired the adjoining lot and constructed their residence in 1942. The extent to which the trees were thereafter recognized as the boundary was in sharp dispute. In 1949, appellees had the line surveyed and discovered that the trees and shrubbery, as well as the eaves of appellants' garage, extended across the surveyed line about one foot. Appellees cut the trees and shrubbery, and appellants sought redress.

Although insufficient time to establish adverse possession had expired when appellees acquired the adjoining lot,[8] appellants' occupancy of their lot had existed for more than fifteen years by the time the survey was made and action filed. Appellants contended their possession extended to the tree line during this entire period, but appellees offered testimony that from 1942 on they had trimmed and cared for the trees and shrubbery and had mowed the grass on the appellants' side of the trees. The trial court commissioner found that appellants had acquired title to the land under the eaves of their garage by adverse possession, but had not possessed the remaining land to the tree line with sufficient continuity to acquire title to it. The Court of Appeals accorded the finding of the commissioner the weight to which it is traditionally entitled, and sustained the judgment.

[7] 268 S.W. 2d 35 (Ky. 1954).
[8] KRS 413.010 to 413.030.

The "eaves" part of the decision clearly is in error. The right to have eaves protrude based on passing of time is not classified as a possessory right, and gives no title to the land underneath the eaves on the theory of adverse possession. Rather, a prescriptive easement for this purpose arises. This distinction is worthy of preservation because it frequently permits the conflicting interests of adjoining property owners to be reconciled with a minimum of interference in title.

In disposing of appellants' adverse claim to the tree line, the court merely said:

> . . . the possession of the claimant must not only be actual but so continuous as to furnish a cause of action in ejectment or for trespass every day during the statutory period, (and) under appellees' version of the facts, the appellants' possession to the row of trees was not sufficient to meet this test.[9]

If taken literally, this statement would seem to mean that appellants should have trimmed the shrubbery, or walked to the trees, or mowed the grass every day during the full statutory period. Even if appellees' testimony that *they* performed such possessory acts at various times after 1942 is given full weight, the fact that appellants' occupancy was no different after that time than before should be worth something. At least there was no affirmative evidence to show that appellants' acts of possession to the contested boundary was any less continuous during the last three years of the statutory period than during the first twelve years. Perhaps the court meant that appellants could not possess the disputed strip after 1942 in the same way they had before because it was then under the physical control of appellees. In any event the decision is hard to rationalize except on the basis that an exceedingly strict test for exclusive acts of possession is necessary to protect property owners against the adverse claim of sporatic occupiers. Such a test hardly seems to fit the ordinary boundary dispute between neighbors who have lived on adjoining property for some time.

The Kentucky court has long recognized that an adverse possessor who actually occupies only a part of the tract may claim to

[9] 268 S.W. 2d 35, 37 (Ky. 1954).

the extent of the description in his deed provided the boundaries called for are clearly ascertainable. This principle is based on the premise that the deed gives a color of title to all of the property included in its description, and that actual possession may extend beyond actual occupancy. In *D. B. Frampton & Co.* v. *Saulsberry*,[10] appellant land company owned 900 acres encircling the 50 acres in controversy. Appellee had an unbroken chain of title to the 50 acres back to the original land patent. Although appellant and those persons from whom he claimed title had sporatically occupied the small tract and cut timber from it, he could not show that it ever was part of the land described in the instruments forming his chain of title. The court correctly held that the rule permitting claim to the extent of the description did not apply where the described boundary overlapped a senior grant. In such case, adverse possession cannot rest on claim alone, but must be evidenced by such physical acts as will give the true owner constant notice of the claimant's possession.

Deeds:

In *Riley* v. *Riley*,[11] a deed from a father to his children contained this provision:

> It is understood and agreed that the first party hereto reserves to himself the full use and control of the above land for and during his natural life *and this deed is only to become effective at his death. . . .*[12]

Although recorded on the day of its execution and delivery, the deed was attacked as testamentary. As might be expected, the court construed the whole instrument as merely reserving a life estate in the grantor. Any language in a deed providing for it to be effective at grantor's death is unnecessary and ill-advised since this creates doubt that grantor intended for it to become operative *inter vivos*. If grantor wishes to postpone possession and enjoyment in the grantee without incurring the formalities in execution required for a will and without jeopardizing the validity of the instrument as a deed, all he needs to do is clearly identify the interest conveyed as a future interest. As experienced conveyancers know, unnecessary references to the effective time of the

[10] 268 S.W. 2d 25 (Ky. 1954).
[11] 266 S.W. 2d 109 (Ky. 1954).
[12] *Id.*, at 110. (Emphasis added)

instrument merely enhance the possibility of ill-founded litigation such as occurred in the *Riley* case.

Restrictive Covenants:

In spite of increased reliance on zoning, deed restrictions are still essential for full protection against neighboring use that is undesirable, especially in a time when the development and expansion of commercial areas are accelerated. Most covenant cases present a construction problem involving the scope or applicability of the restriction, but *Bagby* v. *Stewart's Ex'r*,[13] is a significant exception because the decision covers two fundamental questions concerning enforcability: (1) whether a party to the covenant can enforce it if it is not imposed as part of a general building plan or scheme for the improvement of several contiguous lots, and (2) whether the grantor-covenantee himself can lose his right to enforce it through abandonment, waiver or change in the character of the neighborhood.

The Bagby covenant restricted the property to residential purposes and was imposed when the grantee repurchased land conveyed to the grantor earlier by grantee's husband. The restricted lot joined other unrestricted lots, one of which grantor used as a residence. Grantor subsequently conveyed all of the lots except his own, but none of these deeds contained any restrictions. After this litigation was started, grantor conveyed his own residence for admittedly commercial use. A declaratory judgment action was brought to determine the enforceability of the covenant and the trial court invalidated it. Grantor appealed on the ground that failure to join one of the subsequent grantees was a fatal defect of parties. He contended that this grantee could enforce the covenant if it was valid, and that no action attacking its validity could be maintained unless he was made a party. The appellate court let this procedural issue turn on whether persons not a party to the covenant could enforce it and decided the restriction was unenforceable by the subsequent grantee or by the grantor-covenantee.

The Court of Appeals said that the covenant would run with the land only if this was the intention of the covenantee and that such intention may be implied where the restriction is imposed

[13] 265 S.W. 2d 75 (Ky. 1954).

as part of a general building plan or scheme for the improvement of several contiguous lots. They concluded there was no evidence to support such implication here. The court also said that the grantor-covenantee's right to enforce the covenant had been lost by abandonment and waiver as well as by change in the character of the neighborhood. The opinion admits there are no Kentucky cases directly in point with this principle, but declares the rule to be the well-settled view in most jurisdictions.[14]

Due to its unusual procedural twist, the *Bagby* case probably should be used as a precedent with caution. Apparently no serious attempt was made to show in evidence that the covenant was imposed as part of a plan, and the decision does not suggest any test for determining when neighborhood change has been sufficient to destroy the covenant. In the particular case, only one of the five lots involved was still being used for residential purposes, but the question of the grantor-covenantee's right to enforce actually seems to have turned on waiver and abandoment resulting from the conveyance of his own residence for commercial use after suit was begun.

Landlord and Tenant:

The tort liability of a lessor for injuries resulting from a defect in the premises may depend on whether he has retained control of that part of the property where the injury occurs. If the written lease clearly includes the defective part of the premises, the responsibility falls on the lessee; but there is a presumption that the owner of real estate retains the right of control until he specifically parts with that right.[15] In *Starks Building Co.* v. *Eltinge*,[16] although a defective stairway leading to lessee's basement restaurant was not expressly included in the lease, lessor contended it was included as a matter of law, since it was a necessary adjunct to the restaurant and was not for the common use of several tenants. The trial court let the question go to the jury, and the Court of Appeals sustained this decision on the theory

[14] The court cited only the following statement from 14 Am. Jur. Covenants, Sec. 302: "A change in the character of the neighborhood which was intended to be created by restrictions has generally been held to prevent their enforcement in equity, where it is no longer possible to accomplish the purpose intended by such covenant."

[15] McGinley v. Alliance Trust Co., 168 Mo. 257, 258, 66 S.W. 153, 154, 56 L.R.A., 334 (1901).

[16] 269 S.W. 2d 240 (Ky. 1954).

that any implication arising from the fact that the stairway was a necessary adjunct to the leased premises extended only to the lessor's right to use it and not to the lessee's right to control it.

One particular fact in this case should be of interest to those who draft commercial leases. Lessor introduced in evidence a blueprint attached to the lease which showed the stairway leading down to the basement where the restaurant was located. He contended the blueprint was attached to the written lease for the purpose of identifying the leased area, including the stairway. Lessee contended, and apparently convinced the jury, that the blueprint was attached only for the purpose of showing that part of the *basement* included in the lease. If the lessor intended to include the stairway, this intention should have been clearly stated with a more specific reference to the appropriate part of the blueprint. Indefinite references to accompaning maps and documents can be a real source of trouble in drafting complicated leases.

One rather unusual lease case involving a problem of surrender and the resulting rights of a sub-lessee came before the court in 1954. In *Miller* v. *Tutt*,[17] lessor leased a hotel for ten years, stipulating in the lease that the property should not be sublet without his written permission. Within two years, lessee sublet the premises for five years, and at the end of this time renewed the sublease for three more years to fill out the full term of the original lease. Lessor knew of sublessee's occupancy under the sublease for several years, but there was no evidence he knew the terms of the sublease or had any knowledge of the purported extension of it. Lessor attempted to regain possession of the hotel over a considerable length of time, and eventually repurchased the original lease from lessee. Subsequently, lessor accepted a single rent payment from the sublessee on condition that the premises be vacated, but thereafter he refused to accept rent.

The sublessee claimed the lessor was bound by the sublease, including the extension; and also that after surrender of the original lease lessor stood in no better position than the original lessee. Sublessee insisted further that the lessor had waived all right to object to the occupancy in any event. Although the trial

[17] 264 S.W. 2d 649 (Ky. 1954).

court decided lessor had waived the prohibition against subletting, it held he was not bound by the purported extension of the sublease since this was merely a subterfuge to continue sublessee in possession after the original leasehold rights of the first tenant were extinguished by surrender. In affirming the judgment, the Court of Appeals distinguished a 1952 case holding that a lessor waives forfeiture resulting from subleasing by accepting rent from the sublessee with knowledge of the sublease.[18] The court pointed out that the lessor accepted rent only conditionally and had no knowledge of the terms of the sublease as extended.

The sublessee seems to have claimed too much in this case. He contended in effect that waiver of the prohibition against subletting created a term for years relationship between himself and the lessor. This analysis was rejected on the ground that waiver could not extend so far as to create privity of estate or contract between the lessor and sublessee where the former had no knowledge of sublessee's occupancy prior to surrender of the original lease. The terms of the sublease (particularly the extension of it) were unknown to him, and the court took the view that there could be no term for years where one party had not recognized or agreed to the terms of the lease. If sublessee had claimed only a tenancy by sufferance or at will resulting from lessor's knowledge of his occupancy after surrender and cancellation of the original lease, he would have been entitled to statutory notice pending ouster, but his "estate" clearly would have been revocable.

The sublessee also contended that lessor could stand in no better position than the original lessee. Perhaps this would be true if the lessor were in the position of an assignee of the original lease but as the court was careful to point out, he was claiming as the rightful owner of the property, the original lease having been surrendered. Although surrender will not defeat the estate of a sublessee which he has rightfully acquired under the terms of the original lease, the situation is different where his rights are acquired in violation of such lease and without lessor's consent to terms of the sublease. The decision reached in the *Miller* case works no special hardship on sublessees since they can inquire of their lessor concerning his authority to sublet, and they are pro-

[18] Citizens Fidelity Bank and Trust Co. v. Norfleet, 252 S.W. 2d 54 (Ky. 1952).

tected in any event if the original lessor, having waived restrictions against subleasing, has knowledge of the terms of the sublease.

Future Interests

Construction:

St. Joseph Hospital v. Dwertman[19] was the court's most important future interests decision in 1954. It involved two construction problems which have given the court considerable difficulty in recent years. First, whether the phrase "die without issue" or its equivalent should be given a substitutional construction, and second, whether a life tenant's implied power to consume and dispose except by will should be construed as unlimited. The particular wording of the will was as follows:

> I want my wife and daughter, during their lifetime, to enjoy the full benefit of my estate. In case of the death of both my wife and daughter and there are no heirs blessed to her union then the estate is to be divided between three charitable institutions.[20]

The chancellor held these words created a joint life estate with survivorship coupled with the full power to consume and dispose of the entire estate other than by will. He also held that upon the death of both life tenants the estate should be divided equally among the charities unless the daughter had surviving children.

On appeal the wife and daughter contended the will gave them fee simple ownership. The charities denied this and also contended that the decision authorizing encroachment on corpus was erroneous. The court sustained the chancellor as to the nature of the estate created in the widow and daughter, and refused to give the death without issue provision a substitutional construction. It held, however, that the power to consume and dispose was limited since the life tenant could not willfully waste the property, nor give it away, nor dispose of it by will. The court said that a life estate coupled with this sort of power was appropriately characterized as a "consuming life estate."[21]

The life tenants' argument that the will gave them a fee rested partly on the general import of the whole will and partly on the

[19] 268 S.W. 2d 646 (Ky. 1954).
[20] *Id.*, at 646.
[21] *Id.*, at 648.

belief that testator intended for their interest to be divested only if they both died before he died. In other words, he provided for the gift over to the charities conditioned on death of the widow and death of the daughter without issue merely as a safeguard against their death before the will became effective. Since they did survive until the time when they could be devisees and legatees, there was need for the gift over, and their subsequent death, with or without issue has no legal significance. This sort of interpretation is known as substitutional construction in the authorities.[22] It reflects a judicial preference for indefeasibly vested present interests in fee, and is used most often when testator's precise intention cannot be derived from reading the will as a whole.

As a Kentucky Law Journal student note, summarized more fully *infra*,[23] points out, the traditional Kentucky rule on substitutional construction makes a distinction between a devise of real property and a bequest of personal property conditioned on death without issue. The former raises no constructional preference for substitutional interpretation, but the latter is given a substitutional construction in the absence of any indication of actual intention. Prior to the *Dwertman* case, the court had confirmed this distinction as recently as 1953, in a case where the will disposed of both realty and personalty on condition of death without issue.[24] The difference in rule seems not to have been considered in the *Dwertman* case at all. Based in part on statute[25] and in part on a line of cases stemming from *Harvey* v. *Bell*,[26] the rule was stated in the instant case as follows:

> . . . unless a different purpose is plainly expressed in the instrument, every limitation in a will contingent upon a person dying 'without heirs' or 'without children' or 'issue' or other words of like import shall be construed a limitation to take effect when such person dies.[27]

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[22] For a full analysis and treatment of the doctrine see 2 Simes, Future Interests, Secs. 326-333 (1936).

[23] See discussion beginning on p. 55.

[24] Howard v. Reynolds, 261 S.W. 2d 815 (Ky. 1953).

[25] KRS 381.080 "Unless a different purpose is plainly expressed in the instrument, every limitation in a deed or will contingent upon a person dying 'without heirs,' or 'without children' or 'issue,' or other words of like import, shall be construed a limitation to take effect when such person dies, unless the object on which the contingency is made to depend in then living, or if a child of his body, such is born within ten months next thereafter."

[26] 118 Ky. 512, 81 S.W. (1904).

[27] 268 S.W. 2d 646, at p. 647 (Ky. 1954).

In applying this rule to the Dwertman will, the court justified its rejection of substitutional construction on the grounds that the whole will showed a different intent. Thus the meaningless distinction between a devise and a bequest conditioned on death without issue was confirmed indirectly. Although the logic underlying substitutional construction may be appealing in construing a given will, there is no conceivable justification for applying it to a devise and not applying it to a bequest. At its first opportunity the court should repudiate this distinction and should clarify the Kentucky constructional preference where testator fails to reveal his intention in other parts of the will.

As for the scope of the power to consume and dispose conferred by implication on the life tenants, the *Dwertman* case expressly follows *Collings* v. *Collings Ex'rs*,[28] decided in 1953. In the *Collings* opinion it was made quite clear that a Kentucky testator cannot confer unlimited power to dispose *inter vivos* on the first taker as life tenant merely by a general provision in the will authorizing him to use and dispose except by will. Unless the power is express and explicit it will be construed so as to prevent the life tenant from willfully wasting the property or giving it away. The more fundamental problem presented in the *Collings* case, whether the first taker's interest can be given effect as a possessory fee simple subject to an executory interest over conditioned on failure of the first taker to dispose was not treated in the *Dwertman* case. As the writer will suggest in a forthcoming article discussing remnant gifts over in Kentucky, the court must eventually review its basic position on this problem—a position which has evolved slowly since *Hanks* v. *McDannell*[29]—before any completely satisfactory scheme for construing wills similar to the *Dwertman* instrument can be worked out.

Trusts

Income-Principal:

In 1954 the Kentucky court finally abandoned the so-called Kentucky rule for apportionment of a stock dividend between the successive beneficiaries of a trust or the successive owners of legal

[28] 260 S.W. 2d 935 (Ky. 1953). For a full comment on the case see 42 KY. L.J. 717 (1954). This comment is summarized *infra* p. 56.

[29] 307 Ky. 243, 210 S.W. 2d 784 (1948).

estates. The decision in *Bowles* v. *Stilley's Ex'r*,[30] points out that at least three rules have been used by American jurisdictions to solve this particular problem in fiduciary administration. The traditional Kentucky rule awarded all extraordinary corporate dividends in their entirety to the life tenant without regard for whether it was a stock dividend or a cash dividend or whether it represented earnings that accumulated wholly before or wholly after, or partly before or partly after, the commencement of the life estate. The Massachusetts rule gives the entire extraordinary dividend from earnings to corpus if essentially a stock dividend and to income if essentially a cash dividend, without inquiry in either case as to the time covered by the accumulation of earnings which the dividend represents, and without undertaking to apportion the benefit in the event the earnings accrued partly before and partly after the stock became subject to the life interest. The Pennsylvania rule adopts a middle ground and apportions the dividend on the basis of the time covered by the accumulation of earnings embraced by the extraordinary distribution. If earned before the commencement of the life estate, it goes to corpus; if earned after that time, then to the life estate as income; if earned partly before and partly after the beginning of the life estate, it is apportioned on proper basis between corpus and income.

In repudiating the Kentucky rule and adopting the Massachusetts rule, the court followed the majority trend in other jurisdictions which have come to this conclusion either by judicial decision or by enactment of the Uniform Income and Principal Act. The *Bowles* case also is in keeping with the court's previous criticism of the Kentucky rule in *Laurent* v. *Randolph*,[31] and with the view of stock dividends taken by the Supreme Court.[32] Interestingly enough, as is pointed out in a recent Kentucky Law Journal comment on the *Bowles* opinion,[33] the court made no mention of of the Kentucky statutory rule for allocation of stock dividends adopted in 1950.[34] On its face the Kentucky statute provides a rigid formula to govern this sort of dividend. If the dividend is paid in shares of the same class and is paid at a rate

[30] 267 S.W. 2d 707 (Ky. 1954).
[31] 306 Ky. 134, 138, 206 S.W. 2d 480, 482 (1947).
[32] Gibbons v. Mahon, 136 U.S. 549 (1890).
[33] 43 Ky. L.J. 447 (1955).
[34] KRS 386.020(4).

of ten percent or more of the outstanding shares of that class before the dividend is declared, it is principal. If paid at a rate of less than ten percent, it is income. There is nothing in the statute to suggest that the dividend must be classified as essentially a stock dividend or as essentially a cash dividend before the statutory formula is applied to its distribution.

Although the trust in the *Bowles* case was created long before the statute was passed and although the allocation of the particular dividend satisfied the statutory formula since the dividend rate was more than ten percent, the failure of the court to mention the statutory rule leaves the new Kentucky rule unclear. If the *Bowles* case is followed literally, an extraordinary dividend which is essentially a stock dividend should be given to principal even though it is paid at a rate less than ten percent of the shares of the same class. This is completely contrary to the explicit wording of the statute, and there seems to be no satisfactory way of reconciling the conflict. The statute may have been enacted in an attempt to move toward the Massachusetts rule, but now that the court has embraced the Massachusetts rule completely, the statutory formula is either ineffective or the rule established by the *Bowles* case extends only to stock dividends declared at a rate of ten percent or more. As the court pointed out, the pure Massachusetts rule is a more sensible one because:

> The basic argument in favor of the Massachusetts rule is the fact that a stock dividend is not in any true sense a dividend at all, since it involves no division or severance from the corporate assets of the subject of the dividend.[35]

If a stock dividend does not distribute property but simply dilutes the shares as they existed before, there is little logical reason for distributing it as income merely because it is declared at a rate of less than ten percent. If the Massachusetts rule has a weakness it is the fact that the trustee or the executor must first determine whether the extraordinary dividend is essentially a stock dividend or essentially a cash dividend. The legal basis for this classification is obscure at best.

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[35] 267 S.W. 2d 707, 708 (Ky. 1954).

II. LAW JOURNAL CONTRIBUTIONS

The law relating to resulting and constructive trusts has always been a fertile field for litigation in Kentucky. More than twenty years ago the late Dean Alvin E. Evans wrote an article comprehensively treating local problems in this area which the Court of Appeals has used and cited from time to time.[36] During 1954 a leading article and a student note were published which evaluate a number of the important constructive trust and resulting cases decided since 1931. The article, styled *Current Developments in Resulting Trusts and Constructive Trusts in Kentucky,*[37] written by Wesley Gilmer, Jr. of the Danville Bar, is a summary of the leading modern Kentucky decisions defining and applying well known constructive and resulting trust principles. It describes the essentials, purpose and nature of each, and also explains the application of the Kentucky statute prohibiting purchase-money resulting trusts.[38] The student note written by Paul Decker,[39] now of the Missouri Bar, is a more specialized effort to properly rationalize the purchase-money trust in this state.

The Decker note was occasioned by the court's express refusal in a 1953 case[40] to reconcile what it called "the apparent conflict" in the Kentucky cases concerning the proper designation of a trust arising under Kentucky Revised Statutes 381.170. In the particular case the court reaffirmed its rule that no trust arises under the statute when a deed is made to one person and the consideration is paid by another person, unless the grantee takes the deed in his own name without the consent of the person paying the consideration or unless the grantee, in violation of a trust or an agreement, purchases the land with the effects of another person. The analysis in this note makes it quite clear that the interpretation of the statute has been confused by a failure to distinguish carefully between the basic nature of a resulting trust and a constructive trust. A detailed discussion of the effect of the statute in three situations is given: (1) where grantee takes property in his own name without consent, (2) where grantee takes property in

[36] Evans, *Resulting and Constructive Trusts in Kentucky,* 20 KY. L.J. 383 (1931).
[37] 42 KY. L.J. 456 (1954).
[38] KY. REV. STAT. sec. 381.170.
[39] *"Purchase-Money" Trusts in Kentucky,* 42 KY. L.J. 478 (1954).
[40] Sewell v. Sewell, 260 S.W. 2d 643 (Ky. 1953).

his own name in violation of a trust or where the effect would be to defraud creditors, and (3) where grantee takes property in his own name with an oral agreement to hold the property in trust. Mr. Decker concludes that the Kentucky statute abolishing purchase-money resulting trusts only applies where title is taken with consent and no agreement is present. If title is taken without consent, a constructive trust arises, and this is the case also if title is taken in violation of a trust. Where title is taken with consent but there is a parol agreement to reconvey, the trust may be enforced in Kentucky on the basis of an express trust since the statute of frauds as to trusts does not exist here and the section concerning the sale of real estate is not applied in those cases where the person seeking to enforce the trust paid the consideration for the property.

Continuing interest throughout the state in the legal problems incident to the use of water for agricultural irrigation makes any research in this phase of property law important. In 1952 a very valuable note was published summarizing the legal rights of Kentucky land owners who irrigate from riparian surface streams.[41] In the 1954 volume George B. Baker, now of the Henderson Bar, contributes a treatment of *Irrigation With Non-Riparian Surface Water and Subterranean Water in Kentucky.*[42] The Baker note defines riparian and non-riparian water on the basis of whether it is found in a stream or not and points out that the usual criterion of a stream is water flowing in a natural bed or channel, with defined banks and permanent sources of supply, although in times of drought the flow may be diminished or suspended. The writer also confirms that use of underground stream water in Kentucky is governed by the same legal principles as govern surface riparian water. As for subterranean percolating water, he distinguishs between the common law rule permitting absolute ownership and use by the owner of the land and the so-called American rule basing the land owner's rights on a reasonable use theory. He concludes that the former rule clearly applies in Kentucky subject to two limitations: (1) the use must not be a malicious or unnecessary one and (2) an owner must not contaminate or poison the water so that it is unfit for his neighbor's use.

[41] 40 KY. L.J. 423 (1952).

[42] 42 KY. L.J. 493 (1954).

No Kentucky cases were found involving directly the use of percolating waters for irrigation, but the writer correctly predicts that the common law rule respecting a general use of such water would be followed if the question were presented to the courts. The same dearth of direct authority exists as to irrigation with non-riparian surface waters, those waters diffused over the land or merely draining through natural depressions, such as gulleys and low places. This note emphasizes that litigation concerning surface water rights in Kentucky and elsewhere traditionally has dealt with the right of the land owner to discharge it rather than to put it to beneficial use, but concludes that the owner of land where surface water is found or confined owns the water absolutely.

The May, 1954, issue of the *Kentucky Law Journal*[43] was a 200 page Symposium on the law of wills and administration of estates dedicated to the memory of former Dean Alvin E. Evans, a ranking authority and writer in this field. Every contribution to this exceptionally fine symposium should be of major interest to Kentucky property lawyers as well as those working in the field throughout the country. Most of the articles and notes, however, treat problems in the limited area of wills and administration, or are not focused directly on Kentucky law. Space limitations here permit summary of only two student comments appearing in this issue which do evaluate recent Kentucky cases dealing with future interests problems.

The first discusses the substitutional construction problem in *Howard* v. *Reynolds*,[44] mentioned earlier,[45] and the second is a comment on *Collings* v. *Collings Ex'rs*,[46] pertaining to a remainder over following a purported fee.[47] In commenting on the *Howard* case, Wendell S. Williams, now of the Kentucky Bar and clerk to the Court of Appeals, traces fully the history of the Kentucky rule on substitutional construction. He points out that except for certain implications in the *Howard* Case, the rule for personalty is contrary to the rule for realty. Although the *Howard* opinion may

[43] 42 KY. L.J. 523-723 (1954).
[44] 261 S.W. 2d 815 (1953); *Substitutional Construction as Pertaining to Die Without Issue*, 42 KY. L.J. 714 (1954).
[45] See discussion, *supra*, p. 49.
[46] 260 S.W. 2d 935 (Ky. 1954), *op. cit. supra*, p. 50; *Wills: Remainder Over Following Purported Fee*, 42 KY. L.J. 717 (1954).
[47] See discussion, *supra*, p. 50.

be interpreted as rejecting substitutional construction in the case of a bequest, this note concludes that the rule of *Harvey* v. *Bell*[48] remains intact since the Howard will as a whole expressed a contrary intent. The note discovers no rational basis for continuing the distinction and suggests that the court adopt the same rule for a devise and a bequest. Interestingly enough Williams discovered that the court once inferred that the rule should be the same for both classes of property.[49]

In commenting on the *Collings* case, Roger S. Leland, now in military service, reviews the Kentucky cases dealing with remnant gifts over since 1948. He points out that the court has not minimized the problem of interpreting home made wills very substantially by classifying the validity of a remainder after a purported fee as entirely a construction question. He shows that certain enumerated incidents of ownership, such as the power to dispose by will, are the decisive factors in determining testator's intention as to the nature of the first taker's estate, which in turn governs the validity of the gift over. Although this note concedes there might have been some reason to believe before the *Collings* decision that there could be a valid gift over after a fee in Kentucky, it concludes that this hope is eliminated by the case. This is probably a sound interpretation of the case in so far as the scope of the court's analysis of this vexing problem is concerned; but there remains the possibility of enforcing the gift over after a fee as an executory interest conditioned on failure of the first taker to consume or dispose, a rationalization which the court has not considered or decided in modern times.

Finally, the now well-known decision of the United States Supreme Court in *Barrows* v. *Jackson,*[50] concerning the enforcability of racial restrictive covenants by suit for damages was given extensive treatment in a student comment, also written by Mr. Leland, under the title *Equal Protection—Enforcement of Restrictive Covenants.*[51] In this note the writer makes a careful comparison of Mr. Justice Minton's opinion in the *Barrows* case

[48] 118 Ky. 512, 523, 81 S.W. 2d 671, 674 (1904), *op. cit. supra*, p. 49.
[49] See: Haggin's Trustee et al. v. Haggin, 283 Ky. 821, 143 S.W. 2d 522 (1940).
[50] 346 U.S. 249 (1953).
[51] 43 Ky. L.J. 151 (1954).

with Chief Justice Vinson's opinion in *Shelley* v. *Kraemer*.[52] He also analizes the interim cases of *Weiss* v. *Leaon*,[53] *Roberts* v. *Curtis*,[54] *Correll* v. *Earley*,[55] and *Phillips* v. *Naff*.[56] The Supreme Court's basis for classifying both the suit for injunction and the suit for damages within its concept of "state action" is described. The note concludes with an attempt to project the effect of the Barrows case on certain other evasive devices for compelling compliance with the covenant, such as imposition of a condition on title, use of a cash penalty bond, reservation of an option to repurchase, and obtaining from every subsequent grantee a personal money deposit to be forfeited upon breach. The view is finally taken that the Supreme Court must eventually decide unequivocally that all racial covenants, restrictions, terms, and limitations, in whatever form and in whatever manner provided, are void. Otherwise, existing social and economic pressures will force recurring presentation of the constitutional problem to the highest court.

III. NEW STATUTE

The most important piece of legislation in the property field during 1954 was the water resources and water rights law. The new provisions appear as Kentucky Revised Statutes, 262.670 to 262.690, and they have been fully discussed in a recent student note[57] written by J. Arna Gregory, now of the Kentucky Bar and clerk to the Court of Appeals. Since this note carefully portrays the effect of the statute section by section and also summarizes the Kentucky law of riparian rights prior to its enactment, it may be helpful here merely to describe the comparatively limited scope of the legislation. The provision of the act directing the Kentucky Legislative Research Commission to study the need for additional legislation points up the fact that this statute is not a comprehensive water law code in any sense.

The statute declares the authority of the state to regulate and control water occuring in any natural stream, natural lake or

[52] 334 U.S. 1 (1948).
[53] 359 Mo. 1054, 225 S.W. 2d 127 (1949).
[54] 93 Fed. Supp. 604 (D.C., D.C. 1950).
[55] 205 Okla. 366, 237 P. 2d 1017 (1951).
[56] 332 Mich. 389, 52 N.W. 2d 158 (1952).
[57] *Riparian Rights—Analysis of New Statutory Provisions*, 43 KY. L.J. 407 (1955).

other natural water body because the conservation and beneficial use of this resource is essential to the general welfare, but it establishes no regulatory machinery and empowers no existing state agency to perform this public function. In preparing this legislation for consideration of the General Assembly, it was thought that no immediate need existed for an elaborate licensing and control system. The statute was proposed and adopted on the theory that a few weaknesses in the existing case law governing use of stream water for agricultural purposes should be corrected, and that any attempt to provide Kentucky with a fully developed code for use and conservation of all water resources should await further study and development.

As Gregory's discussion shows in detail,[58] the principle substantive effect of the statute is to eliminate the confusion in the cases concerning the use of a "natural flow" theory or a "reasonable use" theory to measure the extent of permissible use by the upper riparian owner. The legislature has committed Kentucky to the reasonable use theory, but has left to the courts the formidable task of defining this test through application of the statute. The act also confirms the traditional priority extended to domestic uses and provides a slightly clearer definition of these uses than can be worked out in the cases.

Although purporting to be a statute designed to encourage the conservation of public water—water found in a natural stream *et cetera*—, this legislation achieves very little modification of the common law doctrine of riparian rights, a doctrine which imposes little penalty on the wasteful user unless he interferes with a rightful use down stream. Water standing in a stream at a time when the stream ceases to flow is classified under the statute as nonriparian water in order that the abutting land owner may put it to a beneficial use absolutely, and the land owner is permitted to impound water in a stream when the stream flow is in excess of existing reasonable use. These features will correct some apparent inequities under strict application of the riparian rights doctrine, but whether they will result in the conservation of much water remains to be seen. One provision of the statute, probably enacted to encourage conservation through the preservation of existing

[58] *Id.* at p. 412.

beneficial uses, needs to be clarified through judicial interpretation or legislative amendment. KRS 262.690, Sec. 3, subsec. 2 provides that a riparian owner shall have the right to the reasonable use of water which will not deny others sufficient water for domestic purposes, "or impair existing uses of the owners heretofore established." Since the word unreasonable does not appear in the quoted phrase, a literal reading of the clause out of context might suggest that the reasonable use theory or test is not applied to uses of public water already established. This would amount to a sort of limited application of the so-called prior appropriation theory, and would work to the advantage of a particular land owner on the stream if he were the first to establish a special use, such as irrigation. There is nothing in the background of the legislation to indicate the legislature intended this result, and the pertinent section is susceptable of an interpretation consistent with the whole statute when read in context, but the point needs clarification.

Above all, those interested in the Kentucky "water problem" as well as agricultural, industrial and municipal users of Kentucky water should recognize that the 1954 statute is only a good beginning. Continuing effort should be made to design legislation which will help solve many problems. The uncertain legal position of competing stream users, the local governmental pressures created by increasing demand for agricultural, industrial and municipal water supply, and the satisfactory control of all water in the interest of conservation are only a few of the problems that are certain to become more critical.